SIXTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Case No. 6D23-1208
Lower Tribunal No. 2020-CF-6729

OCTAVIUS JEFFERSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Appeal from the Circuit Court for Orange County.
Luis Fernando Calderon, Judge.

February 3, 2023

COHEN, J.

Octavius Jefferson was convicted of first-degree murder in the stabbing death of Deanna Polanco.[1] The sole issue on appeal is the legality of law enforcement's warrantless seizure of Jefferson's phone. On the morning of Tuesday, May 26, 2020,

[1] This case was transferred from the Fifth District Court of Appeal to this Court on January 1, 2023.

following the Memorial Day weekend, Polanco's body was found floating in a canal next to Jefferson's apartment complex. The body was wrapped in a large comforter and multiple trash bags. Along with the body there was a washcloth, an area rug, multiple pairs of pants, a black bag, and a beach towel.[2] The body had multiple stab and slash wounds that the medical examiner opined were the cause of death.

There were drag marks between the water and a building 50-60 feet away. Law enforcement traced blood evidence to apartment 3910 in Building A of the apartment complex. There was blood on the staircase of the building, on the front steps, the second-floor stairwell, and the third-floor stairwell. Drag marks, as well as a trail of blood, appeared to have started at the door of the apartment, going down the steps, and along the walkway with the drag marks ending at the canal. Investigation revealed that Jefferson lived alone in the apartment; his ex-girlfriend had moved out shortly before the May 26.

After securing a search warrant for Jefferson's apartment, officers found blood throughout the apartment. Some blood stains appeared to have been diluted. Crime scene investigators found an empty bleach bottle in a garbage can on Jefferson's balcony.

[2] These items were identified by Jefferson's ex-girlfriend as having been in the apartment they formerly shared.

Sharon McKinnie started dating Jefferson a few months before Memorial Day weekend. Jefferson would occasionally spend nights with her. On Memorial Day weekend, he stayed at her house Friday night, spent the day there on Saturday, and on Saturday afternoon, McKinnie dropped Jefferson off at a hotel in Orlando.

McKinnie next saw Jefferson Sunday morning at her house. She described his look as "crazy" and "weird," his eyes were big, his expression and everything about him was different. He looked "like a monster," like he was "out of his mind." Jefferson told her he was high. He asked if he could take a shower and when he came downstairs, Jefferson had cut off all his hair.

Jefferson left for a few hours, leaving behind a bag in McKinnie's bedroom.[3] Later, he asked McKinnie to pick him up from a plaza near his apartment. That evening, when Jefferson asked to borrow her car so he could move some items, McKinnie refused. Jefferson remained at her house until Monday evening when McKinnie dropped him off at his apartment, taking a friend along because Jefferson was still acting strangely. The bag remained behind in McKinnie's bedroom.

Jefferson returned to McKinnie's house Tuesday around 9:30 a.m., the morning the body was found. McKinnie asked Jefferson why he was there so early. He replied that he could not go home because there were police at his apartment.

[3] Retrieved later by law enforcement, the contents of the bag included blood-stained pants belonging to Jefferson.

They drove to the apartment complex and observed police presence. McKinnie and Jefferson went back to her home.

McKinnie convinced Jefferson that he needed to return to the apartment complex and "find out what's going on." Later that night, Jefferson returned to the apartment complex where he had contact with the police. In a conversation overheard by and recorded on the officer's body cam, Jefferson initially expressed concern for his "wife" and called her, inquiring about her and the children's welfare, ostensibly because of all the police activity. After Jefferson ended the call, the police asked for his phone number, saying they were contacting all the neighbors, which he provided.

Detectives contacted Jefferson on Thursday, May 28 at the apartment complex. Jefferson had been identified as the occupant of the apartment that was the focus of the investigation. Based upon their initial investigation, the detectives believed there could be relevant information contained on Jefferson's phone. When Jefferson refused to voluntarily turn over the phone, the detective seized it and placed it into a Faraday bag, which is designed to prevent the phone from communicating with cell towers so that the information on the phone cannot be compromised. Jefferson was not placed under arrest at that time. On June 2, 2020, a search warrant for the contents of the phone was obtained.

On May 29, 2020, the day after his phone was seized, Jefferson returned to the complex and went into his apartment, which was still being monitored by patrol officers and had yellow crime scene tape around the entrance to the building. An officer confronted Jefferson, asking which apartment he came out of. Jefferson was untruthful, trying to convince the officer that he had gone into the other third floor apartment. Jefferson eventually presented identification and acknowledged that he went into his apartment. Jefferson was arrested for entering the apartment and was transported to the police station where he was interviewed.

Prior to the interview, the detectives watched security video obtained from the apartment complex. It contained images captured from 1:50 a.m. on the 24th until the body was discovered at approximately 8:40 a.m. on the 26th. It showed Jefferson, Justin Carmo, and the victim entering the apartment and Carmo eventually leaving the apartment alone. The video showed Jefferson coming and going from the apartment over the course of the weekend. Jefferson was observed leaving with a pillowcase and a black garbage bag. The only individuals who went in and out during that time frame were other residents. It also showed someone dragging something on the path leading to the canal late Monday night. It did not show the victim ever leaving Jefferson's apartment.

During the interview, Jefferson gave a series of conflicting stories. Jefferson first related that he went to his apartment with Carmo and the victim. Both Carmo

and the victim were smoking crack cocaine and shooting heroin. Carmo and the victim went into a back bedroom. After some time, Jefferson told Carmo that he wanted the pair to leave because it was getting late. Jefferson stated that Carmo and the victim left the apartment and Jefferson went over to McKinnie's home.

Jefferson denied being present when the victim lost her life. He saw on the news that her body was found in the canal but denied any involvement. He did not know how blood got into his apartment or on his pants.

After being told that video evidence did not support Jefferson's version of the events and showed Carmo leaving by himself, Jefferson changed his story. Acknowledging that he had lied, Jefferson related that Carmo left, telling him that he would be back. Jefferson said he told the victim she could stay at the apartment but texted Carmo and told him that he would be leaving. Jefferson stated he left the victim alone in his apartment and that when he returned to the apartment to pick up some clothes, the victim was gone, and he did not see blood upon returning.

When the detective suggested that it made no sense for Jefferson to leave a stranger alone in his apartment, Jefferson changed his story again. He said that the victim told him that if she ever performed oral sex on a black man, Carmo would kill her. She then gave him oral sex. Afterwards, Jefferson told her that she could stay, and they would work things out, but he needed to leave. Carmo texted him later to check on the victim, and Jefferson told him that she was fine, to go check on her

if he wanted. Jefferson denied knowing what occurred after that and again denied killing the victim.

Subsequently, Jefferson changed his story once more, saying that he sent people whom he identified as Fat Boy and Wild Man over to have paid sex with the victim.

At trial, the video from the apartment complex was presented. McKinnie testified to the timeline and events as outlined. A forensic pathologist testified that as they removed the clothes from the victim's body, they found a small plastic bag with a white clumpy material inside, consistent with a controlled substance. Toxicology results showed that the victim had methadone, cocaine, morphine, fentanyl, and other drugs in her system. The victim had an abrasion on her left thumb and a sharp-force injury on her left index finger, as well as additional sharp-force injuries to her fingers. These injuries were consistent with defensive wounds. The victim had a horizontal sharp-force injury that spanned almost the entire front part of her neck. These wounds would have caused substantial blood loss. There was an abrasion on the bridge of her nose, and multiple stab wounds on her neck and upper chest. Additional sharp-force injuries were found near her rib cage, as well as on her back and ankle. The wounds were consistent with a knife, or possibly another sharp object, but most of the stab wounds were more consistent with a knife. The victim's

cause of death was multiple sharp-force injuries. The puncture wounds were deep enough to injure her lungs, liver, and spleen.

The pants located in the bag retrieved from McKinnie's bedroom had ten blood stains. Testing revealed the stains matched Jefferson's DNA. A blood stain on the inside seam of the left pant leg, down near the hem, contained a DNA mixture that matched Jefferson and the victim, as did a swab from the interior waistband of the pants. The blood stains on the pants appeared to be transfer stains.

A blood stain matching Jefferson's DNA was located on the master bedroom door. The detective observed that Jefferson had a cut on his right hand. The cut on his hand was serious enough to produce enough blood to create the castoff pattern found there. A blood swab from the leg of a dining room chair and blood from a carpet cutting from the third floor landing matched the victim's DNA.

Cell phone records from Jefferson, McKinnie, Carmo, and the victim were used to map the location of their phones over the Memorial Day weekend.[4] The victim's phone completely stopped reporting data on Sunday, May 24, at approximately 10:11 am. The phone records included text messages and a log of phone calls made and received. The records corroborated the video evidence, reflecting that Carmo left the apartment alone and did not return to the apartment.

[4] McKinnie and Carmo voluntarily turned over their phones for police review.

Prior to trial, Jefferson moved to suppress the seizure of his phone and any evidence obtained therefrom. Jefferson alleged that the phone was seized without a warrant or probable cause. The motion did not articulate what specific evidence Jefferson sought excluded from trial.

At the hearing on the motion to suppress, the trial court focused on the case of Purifoy v. State, 225 So. 3d 867 (Fla. 1st DCA 2017), noting that the "seizure of property in open view is presumptively reasonable if there is [probable cause] to associate the property with criminal activity. So that's what that case stands for. I think it's instructive on this issue." The trial court also considered the issue of whether exigent circumstances existed to justify a need to seize the phone to prevent the destruction of evidence. There is no record of a written order being entered. However, the court stated:

> I'm going to find that pursuant to the Purifoy case that the -- that the State has established probable cause with respect to obtaining that cell phone. And therefore, the Court will deny the motion to suppress the seizure of that phone.

Despite the articulated reliance on Purifoy,[5] the trial court also observed that, "the officer noted in the report that he had concerns with regards to the destruction of any

[5] Neither the State nor the defense argued the open view doctrine at the hearing on the motion to suppress.

text messages given that he was clearly the last person to have contact with the -- with the deceased at the time that she was alive."

Jefferson proceeded to trial and was convicted of first-degree murder. This appeal followed.

"A trial court's ruling on a motion to suppress comes to an appellate court clothed with a presumption of correctness, and a reviewing court must interpret the evidence in a manner most favorable to sustain a trial court's ruling." State v. Reaves, 15 So. 3d 784, 786 (Fla. 5th DCA 2009). Factual findings are reviewed for competent substantial evidence, and the trial court's application of law to facts is reviewed de novo. Id.

Foremost, a warrantless seizure of personal property is per se unreasonable under the Fourth Amendment. United States v. Place, 462 U.S. 696, 701 (1983). However,

> [w]here law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the Amendment to permit seizure of the property, pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present.

Id.; see also, Hornblower v. State, 351 So. 2d 716, 718 (Fla. 1977) ("[A]ny warrantless search is presumed to be illegal unless there are exigent circumstances

in addition to probable cause."). Stated another way, "the seizure of private property generally requires a warrant" unless the police can show "(1) probable cause to believe that property contains contraband or evidence of a crime and (2) an applicable exception, such as exigent circumstances." United States v. Babcock, 924 F.3d 1180, 1186 (11th Cir. 2019).

One such applicable exception is noted in Purifoy where clothing from a suspect in a homicide was seized from a hospital where the suspect had gone for treatment. Purifoy, 225 So. 3d at 867. The court held:

> Under the open view doctrine, the seizure of the bag of clothing was justified because, even though there was a meaningful interference with Purifoy's possessory right, there was probable cause to associate the bloody clothes with criminal activity. See Illinois v. Gates, 462 U.S. 213, 235, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) ("[O]nly the probability, and not a prima facie showing, of criminal activity is the standard of probable cause."). Law enforcement officers may not simply seize property from a person in a public place absent a showing—of the type made here—that probable cause exists that associates the property with a crime. Having determined that the open view doctrine applies, we need not address the plain view doctrine.

Purifoy, 225 So. 3d at 867.

On appeal, Jefferson argues there was not competent substantial evidence to support a finding that the phone was in open view at the time it was seized. Jefferson correctly notes that the police report used in support of the motion to suppress

contained no facts as to where the phone was located at the time it was seized. It is unknown whether the phone was in Jefferson's pocket, hand, or elsewhere.[6] No other evidence was provided as to the phone's location. Accordingly, to the extent the trial court relied on the open view doctrine articulated in Purifoy, that reliance was misplaced.

Despite the trial court's specific reliance on Purifoy, the State argues that the trial court did not rely on the open view doctrine. Instead, the State urges that there was probable cause and the seizure of Jefferson's phone was necessary to prevent the destruction of evidence, touching on another exception to the warrant requirement. See Kentucky v. King, 563 U.S. 452 (2011) ("the need 'to prevent the imminent destruction of evidence' has long been recognized as a sufficient justification for a warrantless search."); see also Babcock, 924 F.3d at 1195.

In Babcock, the court acknowledged that probable cause was the appropriate standard to seize a suspect's phone, noting that a smart phone is "unique in both the breadth and depth of personal information it stores." Id. at 1191; see also Riley v. California, 573 U.S. 373, 375 (2014) ("[A] cell phone collects in one place many distinct types of information that reveal much more in combination than any isolated record."); Hanifan v. State, 177 So. 3d 277 (Fla. 2d DCA 2015); State v. Darter, 350

[6] While it appears this interaction was recorded by the detective's body-cam, the video was not presented to the trial court.

So. 3d 370 (Fla. 4th DCA 2022). We agree that the appropriate standard to be used to justify the warrantless seizure of a cell phone from a suspect is probable cause, and, in addition to probable cause, absent a warrant, an applicable exception must have existed. See Place, 462 U.S. at 701; and Babcock, 924 F.3d at 1186. As such, our inquiry with respect to the seizure of Jefferson's phone begins with whether the State had probable cause.

At the hearing on Jefferson's motion to suppress, the State failed to present any witnesses, instead relying on a four-page Orlando Police Report Supplement.[7] A review of the report reflects that at the time the phone was seized from Jefferson, the detective knew: that the victim was dead, that the trail of evidence led to Jefferson's apartment, that Jefferson was previously acquainted with the victim and was with her at his apartment on May 24, and that Jefferson had been "less than forthcoming" during an earlier interview with law enforcement. Because Jefferson and the victim were together at his apartment, the detectives believed there would likely be communications between them on Jefferson's cell phone. That assertion was completely speculative. Those facts standing alone do not establish probable cause to believe Jefferson's cell phone contained evidence of a crime. Cf. Babcock,

[7] Nor did the State move the report into evidence at the hearing. On appeal, the State supplemented the record on appeal with the supplemental report that Jefferson stipulated was the information relied on by the trial court. The report in the record on appeal is unsigned.

924 F.3d at 1193 (finding probable cause to seize phone where evidence suggested Babcock was having sex with a minor and there was likely incriminating evidence on his phone because Babcock had voluntarily shown the police a video of the young girl.).

Although subsequent investigation would indeed demonstrate the existence of information from Jefferson's phone of some evidentiary value, it was unknown at the time the phone was seized. Thus, we find the trial court erred in its determination that law enforcement had probable cause when it seized Jefferson's phone.

In line with Babcock, we agree that electronic files, like contraband and records in drug cases, "can be easily and quickly destroyed while a search is progressing." Id. at 1194. (quoting U.S. v. Young, 909 F.2d 442, 446 (11th Cir. 1990)). However, in the absence of probable cause, it becomes unnecessary to address exigent circumstances. See Place, 462 U.S. at 701 (noting that to seize personal property without a warrant, probable cause and an exigency or other exception is required.); see also Babcock, 924 F.3d at 1186; and Hornblower, 351 So. 2d at 718.

The inquiry does not end there though. The State, while not conceding that the trial court erred in upholding the seizure and its admission of the information obtained from Jefferson's cell phone, argues alternatively that any error was harmless. We agree. The text messages between the victim and Jefferson were not a

feature of the State's case. The text messages showed the victim wanted drugs and Jefferson wanted sex in return and to use his apartment for her to engage in prostitution. That same information came into evidence through phone calls made from jail by Jefferson and Jefferson's interview with Detective Ferrara. Additionally, in closing arguments, the defense presented those messages as indicative of a lack of premeditation. The State persuasively established that the erroneous admission of the evidence obtained from Jefferson's cell phone was harmless.[8]

Further, the testimony and evidence as to the location of Jefferson's phone over the course of the weekend was not dependent on either the seizure of Jefferson's phone or the phone's contents. Instead, these records were obtained directly from Jefferson's service provider. Jefferson's phone number was known by law enforcement through their initial contact with Jefferson and from review of both Carmo and McKinnie's phones. Additionally, as outlined, information obtained from Carmo and McKinnie established probable cause to believe that cell-site location information generated when Jefferson's cell phone connected to a cell site would produce information relevant to the investigation.

AFFIRMED.

SASSO, C.J., and NARDELLA, J., concur.

[8] Jefferson offered no response to the harmless error argument.

Matthew J. Metz, Public Defender, and Edward J. Weiss, Assistant Public Defender, Daytona Beach, for Appellant.

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NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF TIMELY FILED